No. 80-1603

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARMAND BERARD,

Petitioner,

v.

GENERAL MOTORS CORPORATION; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; UNITED AUTOMOBILE WORKERS LOCAL 422 AND BAHEEGE AYIK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF IN OPPOSITION FOR UAW

JOHN A. FILLION
General Counsel
M. JAY WHITMAN
Associate General Counsel
CLAUDE D. MONTGOMERY
Assistant General Counsel
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216

BERTRAM DIAMOND
441 Summer Street
Stamford, Connecticut 06901
(203) 324-9284

Counsel for UAW

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the Court of Appeals err in affirming the district court's dismissal of the case, based upon union and employer motions for summary judgment and motions to dismiss where:

(a) It was undisputed that plaintiff suffered no injury as a result of certain of the employer's alleged breaches of the collective bargaining agreement?

(b) It was undisputed that the unions adequately handled plaintiff's personal grievances?

(c) It was undisputed that the actions upon which Berard's LMRDA free speech claim took place were outside the period covered by the Massachusetts tort statute of limitations?

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Index of Authorities	iv
Opinions Below	1
Counterstatement of the Case	2
Summary of Argument	4
Argument	6
I. Berard Has No Standing To Pursue Alleged Breaches Of Contract Which Do Not Threaten His Personal Interests	6
II. Summary Judgment Was Appropriately Granted Where There Was No Factual Dispute That Local 422 Obtained Favorable Results On Plaintiff's Disciplinary Grievances	9
III. The Massachusetts Tort Statute Of Limitations Is The Most Appropriate For LMRDA Free Speech Actions	11
Conclusion	12

PREVIOUS PAGE WAS BLANK

INDEX OF AUTHORITIES

Cases	Page
Adamszewski v. Local Lodge 1487, International Association of Machinists and Aerospace Workers, 496 F.2d 777 (7th Cir.), *cert. denied*, 419 U.S. 997 (1974)	8
Adickes v. Kress & Co., 398 U.S. 144 (1970)	10
Black-Clawson Co., Inc. v. International Association of Machinists, 313 F.2d 179 (2nd Cir. 1962)	8
Brown v. Sterling Aluminum Products Corp., 365 F.2d 651 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967)	
Bryant v. International Union, United Mine Workers of America, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973)	8
Copitas v. Retail Clerks International Association, 618 F.2d 1370 (9th Cir. 1980)	11
First National Bank v. Cities Service Co., 391 U.S. 253 (1968)	5, 10
Graffals v. Garcia, 550 F.2d 687 (1st Cir. 1977)	11
Hines v. Anchor Motor Freight, 424 U.S. 554 (1976)	7, 9
Howard v. Aluminum Workers International Union, 589 F.2d 771 (4th Cir. 1978)	11
International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966)	6, 11, 12
Kaferle v. Frederick, 360 F.2d 536 (3rd Cir. 1966)	9
Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507 (9th Cir. 1978)	8
Republic Steel v. Maddox, 379 U.S. 650 (1965)	7
Santos v. District Council of New York City, 547 F.2d 197 (2nd Cir. 1977)	8
Schultz v. Owens-Illinois, Inc., 560 F.2d 849 (7th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978)	8
Sewell v. Grand Lodge of the International Association of Machinists and Aerospace Workers, 445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972)	11

TABLE OF AUTHORITIES—Continued

Page

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 5, 6
Smith v. Evening News, 371 U.S. 195 (1962) 7
Vaca v. Sipes, 386 U.S. 171 (1967) 5, 9, 10
Warth v. Seldin, 422 U.S. 490 (1975) 5, 9

Statutes

Labor Management Relations Act (LMRA)

§ 7, 29 U.S.C. § 157 6
§ 9, 29 U.S.C. § 159 ..... 5, 9
§ 301, 29 U.S.C. § 185 ..... *passim*

Labor-Management Reporting and Disclosure Act (LMRDA)

§ 101, 29 U.S.C. § 411 11

Rules

Federal Rules of Civil Procedure

Rule 56 ..... 5, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1603

ARMAND BERARD,

Petitioner,

v.

GENERAL MOTORS CORPORATION; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; UNITED AUTOMOBILE WORKERS LOCAL 422 AND BAHEEGE AYIK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR UAW

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is unreported. Pet. App. 1a-3a. The opinion of the District Court is reported at 493 F.Supp. 1035 (D. Mass. 1980). Pet. App. 4a-19a.

COUNTERSTATEMENT OF THE CASE

A. Facts

The petitioner, Armand Berard, began to work for General Motors Corporation (GM) on April 5, 1948, at the Framingham, Massachusetts Chevrolet plant. Berard joined the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the International), and its Local 422, UAW (Local 422), approximately a year later.[1]

Over the next 25 years, Berard held a number of union posts, both elected and appointed. In 1974, Berard was the Recording Secretary for Local 422. While Berard was still a member of the Local 422 Executive Board, Local 422 commenced a six-week strike over local issues. The strike ended November 16, 1974.

After the strike ended, Berard began a grievance filing campaign, protesting alleged management performance of bargaining unit work.[2] A-11. For the next year, Berard continued to file an extremely large number of grievances. The grievances related almost exclusively to alleged management performance of bargaining unit work. A-11-12. The grievances he filed were always on behalf of other union members, even though he no longer held an elected office. Although Berard did not like the results of his campaign, he admitted Local 422 properly processed the grievances. A-12.

Berard has never been a model worker. Between June, 1974, and August, 1979, Berard was given 13 disci-

---

[1] The respondents in this case are GM, the International, Local 422, and Baheege Ayik, who is chairman of the Local 422 bargaining committee.

[2] Such behavior by management would violate ¶ 215 of the Master Agreement between GM and the International. *See*, Pet. App.-22, hereafter A-22.

plinary layoffs for violations of shop rules. A-12. Local 422 filed a grievance on each discipline, and 12 were settled entirely favorably, and 1 was compromised. A-12.

During this period, Berard filed unfair labor practice charges against GM and Local 422 with the National Labor Relations Board. The factual allegations in the charge were substantially the same as those contained in the Complaint in this case, including the conspiracy and discrimination allegations. In 1978, after an investigation, the Regional Director of the NLRB refused to issue a complaint. He found the company's actions to have been legitimate and that Local 422 had not breached its duty of fair representation or otherwise restrained or coerced Berard in the exercise of his rights. A-9.

B. Procedural History

Berard filed the Complaint on August 7, 1979. The Complaint was served on Local 422 and on Baheege Ayik, but was never served on the International. GM filed its Answer on September 21, 1979, while Local 422 filed its Answer on October 1, 1979, and Baheege Ayik filed his Answer on October 30, 1980. The International filed its Answer on February 14, 1980, and included among its defenses a lack of service of process.

All of the union defendants moved for partial summary judgment, as to most of the allegations contained in the Complaint, on May 20, 1980. The union defendants asserted the allegations contained certain paragraphs were beyond the applicable statute of limitations. The motion of the union defendants was accompanied by a memorandum and an affidavit by the International Servicing Representative, Frank Ceccaroni.

On June 6, 1980, GM moved to amend its answer and for summary judgment. That same day, the district

court called the case for trial, to begin June 10, 1980, and ordered Berard's attorney to respond to the motions for summary judgment and the outstanding interrogatories by June 9, 1980. On June 9, 1980, Berard opposed the union's motion for partial summary judgment with only a memorandum, urging the limitations period should be longer than the union asserted. On June 10, 1980, the district court dismissed the International for lack of service of process after Berard's attorney admitted the International had never been formally served with a complaint and summons. After oral argument, Chief Judge Caffrey took all outstanding summary judgment motions under advisement.

On June 20, 1980, Local 422 and Baheege Ayik filed an amended motion for summary judgment, alleging those portions of the Complaint which were not time barred failed to state a claim for various reasons, including lack of injury. A supporting memorandum and affidavit by Baheege Ayik accompanied the amended motion. Berard never opposed the union defendants' amended motion for summary judgment.

On July 24, 1980, Judge Caffrey granted all motions for summary judgment and dismissed the entire case by Memorandum Opinion and Order entered on that date. A-3.

Berard appealed the judgment on August 1, 1980. The Court of Appeals affirmed Judge Caffrey's decision on December 22, 1980, with a *per curiam* opinion, saying only that the "appeal is patently frivolous." A-1.

SUMMARY OF ARGUMENT

The central thrust of petitioner's dispute with respondents concerns alleged violations of ¶ 215 of the Master Agreement between GM and the International which prohibits management from performing bargaining unit

work. While Berard filed many grievances on the subject, those grievances did not involve direct harm to him. Instead, they were attempts to police the agreement on behalf of others. Berard lacks standing to bring a breach of contract action under § 301, LMRA, 29 U.S.C. § 185 against GM, and to bring a duty of fair representation action under § 9(a), LMRA, 29 U.S.C. § 160(a) against the union, because he was not threatened with actual harm. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975).

The district court properly granted summary judgment on the breach of contract on duty of fair representation issues which did involve Berard. Berard must show a breach of the union's duty of fair representation before he may bring a contract enforcement action against an employer. *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

As required by Rule 56, *Fed. R. Civ. P.*, GM and the union defendants supported their motions with affidavits and citations to Berard's admissions during deposition, and other record evidence to establish an absence of dispute as to material facts. The undisputed facts clearly showed the union had not acted in an arbitrary, capricious, or discriminatory manner and, thus, would not support a claim for breach of the union's duty. Defendants having proven the plaintiffs theories untenable, Berard was obligated under Rule 56(e) to adduce factual issues warranting trial. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968). Since Berard's Opposition to Summary Judgment was a restatement of the allegations in his Complaint, summary judgment was properly granted.

The undisputed facts also showed that the events on which Berard's free speech claims were based occurred

more than three year's prior to the filing of the Complaint. Following, *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the district court correctly applied the Massachusetts three-year tort statute of limitations as the most analogous state statute of limitations.

ARGUMENT

I

Berard Has No Standing To Pursue Alleged Breaches Of Contract Which Do Not Threaten His Personal Interests.

The district court in this case addressed many issues when it dismissed this case on motions for summary judgment and motions to dismiss. Most of those issues are listed in a cursory manner in petitioner's description of questions presented. However, the issues may be reduced to a single proposition after analyzing petitioner's reasons for granting writ. Pet. 11-19. Berard asserts he has the right to enforce the collective bargaining agreement "for the benefit of all the union members", even though he admittedly suffered no personal harm, A-13, and did not allege that he was personally threatened with any harm. Clearly, Berard lacks standing to bring such an action, because he has not

> shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation. [*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) (footnote omitted).]

Berard attempts to overcome this problem by arguing he is concerned with "concerted activity" within the meaning of § 7, LMRA, 29 U.S.C. § 157. The existence of concerted activity, by itself, does not give rise to a

power to sue an employer for breach of contract under § 301(a), LMRA, 29 U.S.C. 185(a).[3] Further, Berard's reliance on the existence of concerted activity demonstrates he was interested only in protecting group concerns, not personal disadvantage.[4]

Of course, if a breach of a provision of the collective bargaining agreement threatens Berard with direct harm, he has standing to sue for breach of that contract under § 301, LMRA, *Smith* v. *Evening News*, 371 U.S. 195 (1962), assuming he either exhausted the contractual grievance procedure, *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965), or shows that the grievance procedure was not exhausted because of a union breach of the duty of fair representation. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976).

The Court of Appeals for the Eighth Circuit successfully drew the distinction between the standing of an individual to bring an action under § 301, LMRA, enforcing "uniquely personal" rights instead of those rights possessed by the bargaining unit as a whole. *Brown* v. *Sterling Aluminum Products Corporation*, 365 F.2d 651, 657 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967).[5] As that panel so aptly wrote:

> The individual would have no standing to compel discussion of broad collective bargaining principles

---

[3] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. [§ 301(a), LMRA.]

[4] That reliance is fatal in the face of an admission of no personal harm.

[5] Then, Judge Blackmun was part of the unanimous panel in that case.

> . . . even if such discussion were required by the existing collective bargaining agreement. [365 F.2d at 657.]

The other courts of appeals have not dissented from this view. The Second Circuit held the individual has no power under either § 9(a), LMRA, or § 301, LMRA, to compel arbitration since that is a union function. *Black-Clawson Co., Inc.* v. *International Association of Machinists*, 313 F.2d 179 (2nd Cir. 1962). But, an individual may bring an action under § 301, LMRA, to enforce an arbitration award to which a union was a party. *Santos* v. *District Council of New York City*, 547 F.2d 197 (2nd Cir. 1977).

The Seventh Circuit first noted in *dicta* that an individual may sue for a breach of a promise contained in a collective bargaining agreement that was intended to confer a benefit upon that individual, *Adamszewski* v. *Local Lodge 1487, International Association of Machinists and Aerospace Workers*, 496 F.2d 777, 786 (7th Cir.), *cert. denied*, 419 U.S. 997 (1974), and later held that the uniquely personal rights' test for standing in a § 301, LMRA suit was met where employees sought the direct benefit of training, allegedly required by contract. *Schultz* v. *Owens-Illinois, Inc.*, 560 F.2d 849, 855 (7th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

Similarly, the Ninth Circuit held that "personal rights" may be enforced by individuals under § 301. *Lerwill* v. *Inflight Motion Pictures, Inc.*, 582 F.2d 507, 511 (9th Cir. 1978).[6]

---

[6] The Sixth Circuit has also noted in *dicta* that the question of

> [w]hether standing exists in a particular case turns upon the nature of the right or duty which the individual seeks to enforce.

[*Bryant* v. *International Union, United Mine Workers of America*, 467 F.2d 1, 3 n.1 (6th Cir. 1972) *cert. denied*, 410 U.S. 930 (1973).]

These decisions, as well as the decision below, are consistent with the need for each plaintiff to demonstrate a "personal stake in the outcome of the controversy", before the federal courts will accept jurisdiction. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Since there is also no conflict among the circuits, this Court should reject the petition.[7]

II

Summary Judgment Was Appropriately Granted Where There Was No Factual Dispute That Local 422 Obtained Favorable Results On Plaintiff's Disciplinary Grievances.

In addition to the ¶ 215 violations, alleged to be a breach of contract, Berard challenged certain disciplines as being part of a conspiracy between Local 422 and GM. Berard asserts the alleged wrongful behavior violated the union's duty of fair presentation, and the incidents were a breach of contract by GM. Berard clearly had standing to challenge those disciplines under § 301, LMRA, so long as he proved the union breached its duty of fair representation owed him under § 9(a), LMRA. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976).

The courts below properly applied *Vaca* v. *Sipes*, 386 U.S. 171 (1967) in holding the union did not breach its duty of fair representation as to Berard's disciplinary grievances. The district court found there was no factual dispute as to the handling of those grievances. The union obtained full back pay for all but one of Berard's many disciplines. A-13. GM, Local 422, and Ayik dem-

---

[7] Berard wrongly implies *Kaferle* v. *Frederick*, 360 F.2d 536 (3rd Cir. 1966) demonstrates as split among the circuits on the issue of standing. The court in that case held individuals may pursue personal "complaints of wage deficiencies" under § 301, unless they have failed to exhaust the contractual grievance procedure. *Id.*, at 539. Obviously, the dispute there was not simply a discussion of collective bargaining principles. Rather, it involved issues in which the plaintiff had a "personal stake."

onstrated through affidavits, memoranda, Berard's own deposition testimony, and exhibits the absence of factual dispute. As required by Rule 56, respondents *proved* there was no breach of the duty of fair representation on the undisputed facts. The demonstrated facts could not support plaintiff's theory of arbitrary, discriminatory, or capricious grievance handling in breach of the duty of fair representation, as outlined by *Vaca* v. *Sipes*, 386 U.S. at 190.[8]

The respondents clearly met their obligation of providing evidentiary matter which established the absence of a genuine issue "even if no evidentiary matter [was] presented" in opposition. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 160 (1970). Therefore, under Rule 56(e), Berard could not rely on his allegations in the Complaint, but was obligated to come forward with affidavits or other record evidence establishing a dispute as to material fact. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 288-290 (1968). Since Berard utterly failed to do anything but repeat the allegations in his Complaint, summary judgment was properly granted.

The decision below is consistent with *First National Bank* v. *Cities Service Co.* and *Adickes* v. *Kress & Co.* There is no reason to grant the petition.

---

[8] Berard's distress at the district court's recognition of the NLRB's refusal to issue a complaint is misplaced. Pet. 15-17. First, the district court did *not* hold the refusal was *res judicata* on the issue of the duty of fair representation. A-10. Second, although the district court gave the decision "considerable weight" in establishing an absence of factual dispute, A-10, the court also specifically noted the record supported a finding that the union properly processed all of Berard's grievances. A-13. Thus, the NLRB refusal to issue was merely a significant piece of evidence in the record, indicating the union's treatment of Berard's grievances was not arbitrary, capricious, or discriminatory in nature. *E.g.*, *Vaca* v. *Sipes*.

III

The Massachusetts Tort Statute Of Limitation Is The Most Appropriate For LMRDA Free Speech Actions.

Berard raises as a question, although he made no argument on the issue, whether the court below correctly determined the statute of limitations for violations of the free speech provisions of the § 101, LMRDA, 29 U.S.C. § 411.

There is no express federal statute of limitations for actions brought pursuant to § 101, LMRDA. In the absence of an express federal statute of limitations, *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) instructs the federal courts to use the most analogous state statute of limitations.

The district court in this case applied the Massachusetts general tort statute of limitations.[9] A-16. The affirmance by the Court of Appeals is consistent with other decisions holding LMRDA free speech actions are more analogous to tort claims than contract claims.[10] *Howard* v. *Aluminum Workers International Union*, 589 F.2d 771, 774 (4th Cir. 1978); *Sewell* v. *Grand Lodge of the International Association of Machinists and Aerospace Workers*, 445 F.2d 545, 550 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).[11]

---

[9] Mass. Gen. Laws, ch. 260 § 2A is a three-year statute of limitations.

[10] The First Circuit has held that statutory civil rights actions generally are closer to common law tort than contract actions. *Graffals* v. *Garcia*, 550 F.2d 687 (1st Cir. 1977).

[11] At least one circuit has held such an action is clearly *not* one in contract, though there may be a state period of limitations more appropriate than that for torts. *E.g., Copitas* v. *Retail Clerks International Association*, 618 F.2d 1370 (9th Cir. 1980).

Again, the decision below is consistent with *UAW* v. *Hoosier*, and the decisions of the other courts of appeals.

CONCLUSION

There are no reasons of law or policy warranting review of this case by the Court. The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

JOHN A. FILLION
General Counsel
M. JAY WHITMAN
Associate General Counsel
CLAUDE D. MONTGOMERY
Assistant General Counsel
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216

BERTRAM DIAMOND
441 Summer Street
Stamford, Connecticut 06901
(203) 324-9284

Counsel for UAW

April 22, 1981